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# AHMAD RUBIL AHMAD & ORS v. MINDA MUHIBAH SDN BHD & ANOR; TERMINAL BERSEPADU GOMBAK SDN BHD & ORS (THIRD PARTIES)

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HIGH COURT MALAYA, KUALA LUMPUR
HAYATUL AKMAL ABDUL AZIZ J
[CIVIL SUIT NO: WA-22NCvC-655-09-2019]
14 SEPTEMBER 2023

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**Abstract** – *The tort of negligence requires proof of specific elements before it is established, despite carelessness on the part of the alleged tortfeasor and injury or damage sustained by the claimant. Negligence means more than heedless or careless conduct. Duty in the tort of negligence means a duty imposed by the law or a legal duty. Only the breach of this duty and its resulting damage may give rise to liability for negligence. Damages can only arise if the claimant could substantiate its pleaded case. In the present action, no fault and liability could be attached to the alleged tortfeasor as the claimant's claim was largely grounded on uncertain and speculative evidence.*

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***TORT:*** *Negligence – Claim – Claim for damages and remedial action – Action by registered proprietors and occupiers of houses against developer and main contractor of development works – Allegation that development works adjacent to proprietors' houses caused escape of excess water, sludge and other materials and damaged houses – Whether allegations proven and substantiated – Whether there was duty of care on part of alleged tortfeasors – Whether alleged tortfeasors breached duty – Whether breach caused damage not too remote to proprietors – Neighbour principle – Whether negligence established*

F

***TORT:*** *Nuisance – Claim – Claim for damages and remedial action – Action by registered proprietors and occupiers of houses against developer and main contractor of development works – Allegation that development works adjacent to proprietors' houses caused escape of excess water, sludge and other materials and damaged houses – Whether allegations proven and substantiated – Whether construction works for development unlawfully interfered with use of proprietors' property – Whether nuisance established*

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***TORT:*** *Statutory duty – Breach – Civil liability – Allegation of – Claim for damages and remedial action – Action by registered proprietors and occupiers of houses against developer and main contractor – Allegation that development works adjacent to proprietors' houses caused escape of excess water, sludge and other materials and damaged houses – Whether breach of statutory duty – Whether injury suffered within ambit of statute – Whether statutory duty imposed liability to civil action – Whether statutory duty fulfilled – Whether breach caused injury – Waters Act 1920, s. 5(1)(b) – Environmental Quality Act 1974, s. 25(1)*

I

The plaintiffs were the registered proprietors and occupiers of a row of houses. The first defendant was the developer of the land adjacent to the plaintiffs' houses and the second defendant was the main contractor appointed by the first defendant to carry out the project construction and development works. The plaintiffs' pleaded claim against the defendants was that: (i) before the construction by the defendants began in 2009, there was a low-lying swampy area that acted as a detention pond behind the plaintiffs' houses. The water collected in the said pond came from the surface runoff from the MRR2 highway and its adjacent areas, both of which were elevated to the pond. The water collected would then flow into a stream and discharged into another detention pond; (ii) in 2018, the defendants began its construction development work involving substantial earthworks and backfill on the land adjacent to the plaintiffs' houses. This was followed by the erection of a reinforced concrete retaining wall ('RC wall') at the ground boundary near the plaintiffs' houses; (iii) subsequent discoveries had shown that the first defendant allegedly did not disclose the existence of the said detention pond collecting water from the MRR2 and the surrounding areas. The non-natural use of the defendants' land caused damage to the plaintiffs' houses. The construction work covered the detention pond with soil, disrupting the water flow from the MRR2. With the RC wall elevated higher than the plaintiffs' houses, there was no longer any setback; (iv) on 12 November 2018, a large volume of water, soil, debris and other waste materials accumulated and escaped into the plaintiffs' houses during heavy rainfall. On 28 March 2019, the remains of the swampy area after the filling works were flooded and the water escaped through the gaps in the RC wall and flowed to the plaintiffs' houses. On 4 April 2019, accumulated water on the land began to overflow from the upstream low-lying areas and over the top of the RC wall and spilled into some of the plaintiffs' houses. Consequently, the rear wall of the ninth and tenth plaintiffs' houses collapsed. The municipal council issued a stop work order to carry out mitigation work, with limited measures taken by the Public Works Department ('JKR'); (v) on 30 August 2019, the defendants carried out further earthworks, including digging a trench parallel to the RC wall. It was alleged that the construction activities of the defendants caused severe damage to the plaintiffs' houses; (vi) the plaintiffs centred its assertion on the alleged breach of s. 5(1)(b) of the Waters Act 1920 ('WA') by the defendants for adversely impacting and obstructing the detention pond. Their action also offended s. 25(1) of the Environmental Quality Act 1974; (vii) apart from damages, the plaintiffs also sought remedial action from the defendants to address the situation which included the demolition of the RC wall. The defendants argued that, *inter alia*, (i) they had the requisite authority and approval to carry out the development project; (ii) the MRR2 was situated on an elevated topographical point compared to the first defendant's land and the plaintiffs' houses; (iii) the defendants did not cause the three incidents of flooding; (iv) the source of water that caused the flooding was from the MRR2; (v) there was no evidence adduced by the plaintiffs to show that the

A construction and backfilling of the RC wall caused the ground settlement; and (vi) damages did not arise if the plaintiffs could not substantiate their pleaded case. The defendants also contended that if they were liable, they were entitled to be indemnified by third parties. The defendants were given leave to bring in the third parties in this suit, namely (i) Terminal Bersepadu B Gombak Sdn Bhd ('TEGAS'); (ii) the Government of Malaysia; and (iii) the Director General of JKR.

**Held (dismissing plaintiffs' suit; striking out defendants' claim against third parties):**

C **(1)** The postulations by the plaintiffs were unconvincing for want of compelling evidence. In an action for negligence, the plaintiffs must establish (i) the defendants' action was the effective cause of the injury suffered by the plaintiffs; (ii) there must be a causative link between the wrongdoing and the damage/injury caused; and (iii) the plaintiffs' claim must fail without a causative link. There was nothing from the facts D adduced that attached the defendants with fault and liability appropriately. The plaintiffs failed to meet two out of the three legal requirements to establish negligence *ie*, (i) that there was a duty of care on the part of the defendants; (ii) the defendants breached this duty; and (iii) the breach caused damage to the plaintiffs. (para 11)

E **(2)** Contrary to the assertions of the plaintiffs, the water source that caused the flooding and damage was essential to this case. It was undeniable at the time that a substantial deluge of surface runoff water from the MRR2 (during the upgrade period) had contributed to the area's flooding. Evidence showed that the relevant authorities were concerned about F diverting the water to Sungai Gombak, involving third parties to mitigate flooding issues. However, evidence showed that it was not done. JKR had to take mitigating actions to arrest the problem. There were upgrading works on the MRR2 with significant volumes of surface runoff water being diverted into the plot of land north of the first G defendant's land. In the circumstances, other than the defendants, other relevant and pertinent parties were in play to the flooding incidents that had not been brought forward for whatever reasons best known to the plaintiffs. The defendants had produced sufficient materials to show that their construction and development activities in the project secured all H the required approvals from the relevant public authorities. They had the legal right to undertake the duly approved project on the first defendant's land. (para 12)

**(3)** TEGAS, the owner of the MRR2, a highway that was on an elevated topographical point compared to the first defendant's land and the I plaintiffs' houses, had also obtained the approval from Majlis Perbandaran Selayang, Jabatan Pengairan dan Saliran Daerah Gombak ('JPS') to carry out drainage works to divert surface runoff water while the planned upgrading works were undertaken. It had been shown that

TEGAS had constructed two cascading drains from the MRR2, which immediately diverted surface runoff water from the MRR2 onto a plot north of the first defendant's land. A slit trap was also constructed at the bottom of the cascading drains. Surface runoff water from the MRR2 would flow into the slit trap and, following the land's topography, flow towards the lower-lying area of Taman Mutiara Gombak 2. It had also been shown that no flooding incidents occurred before this exercise. The deluge occurred on three separate incidents. Cognisance must be taken that (i) on 9 April 2019, the first defendant, JPS, JKR, and TEGAS (all parties in play) met to decide that JKR would divert the water from the MRR2 to Sungai Gombak, which was towards the northern direction and away from the first defendant's land; and (ii) after JKR eventually sealed off the sump on the top of one of the cascading drains from the MRR2, where the volume of water from the MRR2 was being diverted into the plot of land adjacent to the first defendant's land, no further incidents of flooding occurred. Taking these facts in their totality, the plaintiffs' claim was wanting in compelling proof to attach liability on the defendants for the deluge that occurred and the resulting damage to the plaintiffs' houses. There was no evidence to attach liability to the defendants. (para 12)

**(4)** The plaintiffs' arguments on the RC wall as the cause of the deluge and the damage to the plaintiffs' houses were flawed and unproven. Other than conjectures, there was no persuasive evidence that the RC wall was the cause of the flooding that occurred. What had been argued by the plaintiffs was speculative at best. (para 12)

**(5)** The construction works for the development of the first defendant's land had not unlawfully interfered with the use of the plaintiffs' property. The allegation of nuisance must fail in the circumstances. Further, based on the lack of persuasive evidence, the defendants had not breached s. 5(1)(b) of the WA by obstructing and/or blocking the stream from the detention pond, which also answered the allegation on the breach of s. 7(1) of the WA by causing the diversion of rivers from their natural water course without lawful authority and/or the requisite licence under the WA. The four elements required to establish a civil liability for the breach of statutory duty were also not satisfied, namely: (i) the injury suffered was within the ambit of the statute; (ii) the statutory duty imposed a liability to a civil action; (iii) the statutory duty was not fulfilled; and (iv) the breach had caused the injury. There was no compelling evidence that could nail liability on the construction and/or development works carried out by the defendants, causing settlements to the plaintiffs' land and impacting the houses. (paras 13 & 14)

**Case(s) referred to:**

*Anns v. Merton London Borough Council [1978] AC 728* ***(refd)***

*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals [2003] 1 CLJ 585 CA* ***(refd)***

*Bank Bumiputra Malaysia Berhad lwn. Tetuan Wan Marican Hamzah & Shaik & Lagi [1994] 2 CLJ 365 HC* ***(refd)***

*Blyth v. Birmingham Waterworks Co [1856] 11 Ex Ch 781* ***(refd)***

*Britestone Pte Ltd v. Smith & Associates Far East, Ltd [2007] 4 SLR(R) 855* ***(refd)***

*Caminer v. Northern And London Investment Trust Ltd [1950] 2 All ER 486* ***(refd)***

*Caparo Industries Plc v. Dickman [1990] All ER 568* ***(refd)***

*Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA* ***(refd)***

*Donoghue v. Stevenson [1932] AC 562* ***(refd)***

*Dr Gun Suk Chyn & Ors v. Kartar Kaur Jageer Singh & Anor [2014] 1 CLJ 838 CA* ***(refd)***

*Dr Noor Aini Hj Sa'ari v. Sa-Art Sae Lee & Anor [2016] 2 CLJ 23 CA* ***(refd)***

*Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat & Other Appeals [2017] 2 CLJ 274 CA* ***(refd)***

*Gore v. Stannard (t/a Wyvern Tyres) [2014] QB 1* ***(refd)***

*Government Of Malaysia & Ors v. Jumat Mahmud & Anor [1977] CLJU 29; [1977] 1 LNA 29 FC* ***(refd)***

*Governors Of The Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] AC 210* ***(refd)***

*Guan Soon Tin Mining Company v. Wong Fook Kum [1968] CLJU 43; [1968] 1 LNS 43 FC* ***(refd)***

*Hall v. Brooklands Auto-Racing Club [1933] 1 KB 205* ***(refd)***

*Heaven v. Pender [1883] 11 QBD 503* ***(refd)***

*Home Office v. Dorset Yacht Co Ltd [1970] AC 1004* ***(refd)***

*Johara BI Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] CLJU 199; [1980] 1 LNS 199 FC* ***(refd)***

*Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals [2022] 10 CLJ 209 CA* ***(refd)***

*Leigh & Sillavan Ltd v. Aliakmon Shipping Co Ltd [1986] 2 All ER 145* ***(refd)***

*Lochgelly Iron And Coal Co v. McMullan [1934] AC 1* ***(refd)***

*Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors [1982] CLJ 150; [1982] CLJ (Rep) 232 FC* ***(refd)***

*Ngan Siong Hing v. RHB Bank Bhd [2014] 3 CLJ 984 CA* ***(refd)***

*Rhesa Shipping Co SA v. Edmunds [1985] 1 WLR 948* ***(refd)***

*Rowling v. Takaro Properties Ltd [1988] 1 All ER 163* ***(refd)***

*Rylands v. Fletcher [1868] LR 3 HL 330* ***(refd)***

*Selvaduray v. Chinniah [1939] CLJU 107; [1939] 1 LNS 107* ***(refd)***

*Swamy v. Matthews & Anor [1967] CLJU 174; [1967] 1 LNS 174 FC* ***(refd)***

*Tokio Marine Insurans (M) Bhd v. WCT Construction Sdn Bhd & Anor [2018] 4 CLJ 808 HC* ***(refd)***

*Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Dev (M) Sdn Bhd [1985] CLJU 103; [1985] 1 LNS 103 HC* ***(refd)***

*Yuen Kun-Yeu v. AG Of Hong Kong [1987] 2 All ER 705* ***(refd)***

**Legislation referred to:**
Environmental Quality Act 1974, s. 25(1)
Evidence Act 1950, ss. 101, 102, 103
Rules of Court 2012, O. 53
Town and Country Planning Act 1976, s. 21A(1)
Waters Act 1920, ss. 5(1)(b), 7(1)

*For the plaintiffs - Rajendra Navaratnam & Koh Yi Ting; M/s Azman Davidson & Co*
*For the defendants - R Thayalan & Daniel Bock; M/s Shukor Baljit & Partners*
*For the 1st & 3rd party - Aliff Ridhwan Mohd Yusof; M/s Hisham Sobri & Kadir*
*For the 2nd & 3rd party - Siti Rafidah Zainuddin; FC*

*Reported by Lina E*

**JUDGMENT**
(encl. 1)

**Hayatul Akmal Abdul Aziz:**

**Introduction**

**[1]** The claim comprises of:

(i) the plaintiffs (Ps'), who are the registered proprietors of their residential houses (as described in the statement of claim) located at Jalan Mutiara Gombak 2, Selangor;

(ii) the first defendant (D1) was the developer and/or occupier of land known as Lot 17782, Geran Mukim 1710, Mukim Setapak, Daerah Gombak, Selangor Darul Ehsan (the defendants' land), which is adjacent to the Ps' houses, was undertaking a development project known as Anjung Melati Dua (the defendants' project). The second defendant (D2) is the main contractor appointed by D1. D1 and D2 are collectively referred to as the Ds in this judgment;

(iii) on 27 November 2019 and 5 February 2021 respectively, the Ds were given leave to bring in the third parties in this suit:

  (a) Terminal Bersepadu Gombak Sdn Bhd (referred as TEGAS/TP1);

  (b) Government of Malaysia (referred as TP2); and

  (c) Director General of Public Works Department (referred as JKR/TP3).

  TP1, TP2 and TP3 are collectively referred to as the TPs in this judgment.

(iv) the Ps are seeking compensation for the alleged escape of excess water, sludge and other materials occasioned by floods that had adversely impacted and damaged their houses. These events are alleged to have

been caused by the Ds' construction and development work adjacent to the Ps' houses. Consequently, they are seeking general and special damages against the Ds; and

(v) on 22 June 2023, after considering the facts, the totality of the evidence adduced at the trial, and the parties' respective arguments, I dismissed this suit with an order that the parties are to bear their respective costs. Similarly, the claim against the third parties is struck out with the liberty to file afresh; and

(vi) aggrieved, the Ps filed this appeal against my decision, and these are my reasons.

**Brief Facts**

**[2]** As set out in the agreed facts (encl. 35), the parties agreed amongst others that:

(i) the Ps are the registered proprietors and occupiers of a row of houses on Jalan Mutiara 2 (the Ps' Houses);

(ii) D1 is the developer of the land (Lot 17782, Geran Mukim 1710, Mukim Setapak, Daerah Gombak, Selangor) adjacent to the Ps' Houses;

(iii) the development project being undertaken by D1 is "Cadangan Membina 29 Unit Rumah Teres Tiga Tingkat" on the said land;

(iv) D2 was appointed as the main contractor by D1 to carry out the project construction and development work;

(v) parties agree that the source of the water running towards the low-lying swampy area originated from, amongst others;

(a) Lebuhraya Lingkaran Tengah 2 (MRR2) surface run off; and

(b) its adjacent areas.

both are situated on an elevated terrain to the detention pond in the same vicinity of the Ps' Houses;

(vi) the residents' association, including the Ps, had raised concern regarding the construction of the reinforced concrete retaining wall (RC wall) by informing the relevant authorities, including Majlis Perbandaran Selayang (MPS), Jabatan Pengairan dan Saliran Daerah Gombak (JPS), and the Chief Minister of Selangor (MB); and

(vii) after the third flood (4 April 2019), MPS issued a stop work order against the Ds and for the Ds to carry out mitigation works before resuming construction works.

**[3]** The Ps seek compensation:

(i) for the alleged escape of excess water, sludge and other materials occasioned by floods that had adversely impacted and damaged their houses;

(ii) these events were allegedly caused by the Ds arising from their construction development work near the Ps' houses (adjacent to the Ps' homes);

(iii) they now seek general and special damages against the Ds.

**[4]** The Ds argued that if they are liable, they are entitled to be indemnified by third parties, *ie*, TP1, TP2, and/or TP3. They claim they deserve contributions from the TPs.

**[5]** The pleaded claim of the Ps says:

(i) before construction began [2009], a low-lying swampy area had acted as a detention pond behind the Ps' Houses;

(ii) the water collected in the said pond comes from surface runoff from the MRR2 highway and its adjacent areas, both of which are elevated to the pond;

(iii) the water collected would then flow into a stream and discharge into another detention pond next to Surau Al Mukmin, Jalan Mutiara 1, Gombak;

(iv) in early 2018, the Ds began its construction development work involving substantial earthworks and backfill on the land adjacent to the Ps' Houses. This was followed by the erection of a reinforced concrete retaining wall (RC wall) at the ground boundary near the Ps' Houses.

(v) the resident's association, including the Ps, protested and raised concerns on the erection of the RC wall to the municipal council but to no avail;

(vi) subsequent discoveries had shown that D1 allegedly did not disclose the existence of the said detention pond collecting water from the MRR2 highway and surrounding areas. Still, after a short rescheduling of construction works, it continued;

(vii) occasioned by the non-natural use of the Ds' land, it caused damage (settlement of ground and cracks) to the Ps' Houses. The construction work covered the detention pond with soil, disrupting the water flow from the MRR2 highway;

(viii) with the RC wall elevated higher than the Ps' Houses, there was no longer any setback;

(ix) on 12 November 2018 (first flood), a large volume of water, soil, debris and other waste materials accumulated and escaped into the Ps' Houses during heavy rainfall;

(x) on 28 March 2019 (second flood), the remains of the swampy area after the filling works were flooded, and the water escaped through the gaps in the RC wall and flowed to the Ps' Houses;

(xi) on 4 April 2019 (third flood), accumulated water on the land began to overflow from the upstream low-lying areas and over the top of the RC wall and spilled into some of the Ps' Houses. Consequently, the rear wall of the nineth and tenth Ps' Houses collapsed. The municipal council issued a stop work order to carry out mitigation work, with limited measures taken by JKR;

(xii) on 30 August 2019, the Ds carried out further earthworks, including digging a trench parallel to the RC wall. It was alleged that the construction activities of the Ds caused severe damage to the Ps' houses, breaching the common law duty of care (negligence) to the Ps. They were alleged to be knowingly reckless in carrying out their construction development works;

(xiii) it was also alleged that the Ds are in statutory breach of s. 21A of the Town and Country Planning Act 1976 in failing to disclose the detention pond's existence in its application for planning approval (this issue was, however, dropped and not pursued by the Ps);

(xiv) the Ps centres its assertion on the alleged breach of s. 5(1)(b) of the Waters Act 1920 for adversely impacting and obstructing the detention pond. Their action also offends s. 25(1) of the Environmental Quality Act 1974;

(xv) the Ds are also allegedly liable for nuisance for the unnatural use of their land that interfered with the Ps' land; and

(xvi) apart from general, special, aggravated, and punitive damages, the Ps ask for remedial action from the Ds to address the situation which includes the demolition of the RC wall.

JALAN MUTIARA 2
APPROXIMATE EXTENT OF LOW LYING AREA
MH02
DIRECTION OF FLOW
STREAM FLOWS INTO CULVERT NEXT TO HOUSE 32
CONVEYANCE CULVERT RUNS ALONG JALAN MUTIARA 1 TO DISCHARGE INTO RETENTION POND OUTSIDE DEVELOPMENT
FIGURE 2

Arial view of the impacted location adduced at trial by the Ps

**[6]** In their defence, the Ds pleaded: A

(i) in carrying out its construction development work, the Ds had secured all necessary approvals from all relevant authorities for the go-ahead, including the erection of the RC wall.

(ii) even though the residents association, including the Ps, had objected and protested, they did not take any action to prevent the work from proceeding, showing they had agreed with the terms of the approval with the relevant authorities. No move to challenge the approvals granted by the relevant authorities was taken to arrest the impugned development. B C

However, I observed from the cause papers, an *ex parte* application for an interim injunction (encl. 48) was made by the Ps before Dato Mohd Firuz bin Jaffril J, where the learned judge then had granted the injunction (encl. 77) to temporarily restrain any works being undertaken by the Ds within ten metres from the RC wall until the merits was heard. The parties, however, entered into a consent order on 2 September 2020 (encl. 100), allowing the Ds to carry out works in accordance with terms imposed by the local authorities, and ensuring that the said works are safe for the Ps. The Ps undertake to pay any damages to the Ds that arise as a consequence of the said injunction. D E

(iii) the detention pond was not part of the Ds', land (comprising 29 lots).

(iv) the flow of surface runoff water from the MRR2 highway is through a temporary cascade drain of MRR2, which falls under the purview of JKR and/or its agents or servants or contractor, Terminal Bersepadu Gombak Sdn Bhd (TEGAS) for the upgrading works on MRR2 at the time. The temporary cascade drain is a temporary measure JKR and TEGAS took to direct surface water runoff while upgrading works were in place. F

(v) before the erection of the RC wall, the Ds had secured the Soil Investigation Report in December 2013, terrain mapping on 11 February 2014, geotechnical report on 20 March 2017, and independent auditor report in April 2017. The construction of the RC wall complies with all necessary legal requirements. G H

(vi) the Ps had done extensive renovations and/or extension works on their houses to the boundary's edge with no setback present. The Ps had refused Ds' offer to carry out a dilapidation survey on their houses (to determine the structure and settlement of the ground).

(vii) the Ds denies that the cracks appearing on the Ps' Houses are caused by their construction works. I

(viii) D1 had notified the municipal council on 7 May 2018 that the upgrading works on MRR2 should have a sound water dispersal system rather than allow it to be discharged on private lands, but no action was taken. At a meeting with all parties, the parties agreed that JKR should ensure that the water flow should be diverted to the Sungai Gombak, not the detention pond. Despite several letters and reminders, no action has been taken by the municipal council, TEGAS and/or JKR.

(ix) in the circumstances, the Ds cannot be faulted for the said floods. It was an act beyond the Ds. The approval they obtained several months before the approval was granted to TEGAS and JKR for the upgrading works had not contemplated the volume of water from the surface runoff of the MRR2 highway during the upgrading works.

**[7]** Parties had demarcated the issues between them into agreed and non-agreed issues, and my determination in this suit is grounded on the evidence and how they had canvassed and ventilated their respective position:

(i) agreed issues between the parties:

(a) negligence:

Whether the Ds individually and/or jointly owe a common law duty of care to the Ps in undertaking the construction works. If so, whether the Ds had breached this duty of care?

(b) whether the construction works caused the flooding incidents on 12 November 2018, 28 March 2019 and 4 April 2019 on the Ps' lands and/or houses.

If so, what are the damages suffered?

(c) nuisance:

Are the construction works a non-natural use of the land?

If so, had it unlawfully interfered with the use of the Ps' lands, and did the Ps suffer the losses and damages?

(d) breach of statutory duties:

Whether the Ds have any statutory duty towards the Ps?

Did the Ds breach s. 5(1)(b) of the Waters Act 1920 ("Waters Act") by obstructing and/or blocking the stream from the detention pond?

Did the Ds breach s. 7(1) of the Waters Act 1920 by causing the diversion of rivers from their natural water course without lawful authority and/or the requisite licence under the Waters Act 1920?

If so, what are the losses and damages suffered by the Ps?

(ii) non-agreed issues:

If the Ds owed the duty of care and had breached the said duty, causing flooding, did the construction and/or development works carried out by the Ds cause settlements to the Ps' land and/or houses?

If yes, what are the damages suffered by the Ps?

**[8]** The defendants' submissions (L.230 & L.233).

In resisting the Ps' claim, the Ds argued that:

(i) the Ds has the requisite authority and approval to carry out the development project:

(a) the Ds obtained formal written approval from Jabatan Pengairan dan Saliran (JPS) on 25 May 2016 concerning the development project's earthworks, road, and drainage works.

(b) Majlis Perbandaran Selayang (MPS) approved the development project on 28 August 2017 and commenced construction on 1 March 2018.

(c) part of the approval was the erection of the RC wall on the western boundary of D1's land immediately next to the Ps houses. D1's land was elevated higher than the Ps'. The erection of the RC wall was completed in April 2019.

(ii) MRR2 is situated on an elevated topographical point compared to D1's land and the Ps' Houses in Taman Mutiara Gombak 2.

(a) Terminal Bersepadu Gombak Sdn Bhd (TEGAS/TP1) obtained on 14 March 2017 (some ten months after the Ds' approval), a JPS approval concerning drainage works with the planned upgrading works on MRR2.

(b) TP1 had constructed two cascading drains from MRR2, which immediately diverted surface runoff water from the MRR2 onto a plot north of D1's land. A slit trap was also constructed at the bottom of the cascading drains. Surface runoff water from the MRR2 would flow into the slit trap and, following the land's topography, flow towards the lower-lying area of Taman Mutiara Gombak 2.

(iii) the Ps alleged flooding occurred on three occasions:

(a) on 12 November 2018, muddy water flowed/flooded into some/all of the Ps' houses.

(b) on 28 March 2019, water flowed into the space between the RC wall and some/all of the Ps' houses.

(c) on 4 April 2019, water flowed into the houses of the third and fourth Ps and the nineth and tenth Ps.

(d) on 9 April 2019, at a meeting between D1, MPS, JPS, JKR and TP1, it was decided that JKR would divert the water from the MRR2 to Sungai Gombak, which is towards the northern direction and away from D1's land.

(e) JKR eventually sealed off the sump on the top of one of the cascading drains from MRR2, where the volume of water from MRR2 was being diverted into the plot of land adjacent to D1's land and the Ps' houses were drastically reduced.

(iv) it was discovered that a hole in the seal in the sump was presumably made by squatters in the area, which increased the volume of water being diverted from MRR2 to the plot of land adjacent to D1's land and the Ps' houses. However, such volume was still significantly less than before the sump sealing. Since the sealing of the sump, no further incidents of flooding occurred.

(v) it is argued that the Ps had made a peculiar claim for alleged house damage. While some pleaded damages caused by the construction works, others pleaded damages allegedly caused by the flood in paras. 13(a), 13(b), 15, 17, and 23 of the amended SoC, with their prayers for relief in para. 31.

(vi) the Ds structured their arguments as follows:

(a) the Ds did not cause the three incidents of flooding.

It is not disputed that the upgrading works on MRR2 were ongoing at the time, with significant volumes of surface runoff water being diverted into the plot of land north of D1's land.

This was after the Ds obtained their approval for works on the development to commence. From the factual circumstances, the Ps' action lies with TP1 and/or the relevant authorities. The Ds had nothing to do with the diversion of the runoff water.

Even before the flooding started, D1 had raised its concern by letter (7 May 2018, Bundle C, p. 222, IDB-Vol 2) to MPS that the water should not be discharged into the land north of D1's land. JPS confirmed in writing to MPS that the water in the area was collected from the roadside drain of MRR2 (JPS letter 11 September 2018, Bundle C, p. 253, IDB-Vol 2).

The flooding incident ceased after the sump of one of the cascading drains from MRR2 was sealed (action was taken after the meeting on 9 April 2019 between D1, JPS, MPS, JKR and TP1). In addition, it was a time of historic rainfall at that time that had affected Klang Valley. SP14 (Dr Toh Cheng Teik, Ps' expert witness) confirmed no more flooding was reported after the foregoing action was taken (pp. 97 to 98, NOP Vol. 3, encl. 226).

All earthworks, roadworks and drainage work on D1's land was within the context of the JPS approval granted on 20 May 2016, where Ds had prepared temporary drainage infrastructure on D1's land. This was confirmed by SD2 (Dr Andy Chiam Tou Ping, Ds' expert witness) in his evidence (p. 375, NOP, Vol 3, encl. 226). Except for three instances, the temporary drainage measure managed to accommodate the deluge of water from the MRR2, with no flooding of the Ps' Houses. The Ds claimed they had carried out their obligations adequately and sufficiently and should not be made to shoulder the liability of TP1.

(b) contrary to the Ps' claim, there is no evidence of a river/stream in the area at the time.

The Ps seek to fault the Ds for not disclosing the existence of this alleged river/stream when seeking approval for the project (cognisance must be taken that the Ps in the amended SoC did not mention any stream/river, but only a retention pond). During the trial, the Ps attempted to argue on the alleged existence of the stream/river using exh. P5.

It was mentioned by SP4 (Mohd Hasrul Hisham bin Abdullah, an engineer with JPS Daerah Gombak) in his evidence that the sketch plan (P5) is overlaid on an old map most likely from a time even before MRR2 (1990s) was constructed (pp. 170 to 171, NOP, Vol. 1, encl. 212). SP4 speculated that given MRR2 cut across the rivers in P5, the rivers would likely either be diverted or a culvert prepared underneath MRR2 to allow for the river to continue flowing *sans* any corroborating evidence.

Till now, no proof is available to show if they still existed. No photographs, video recordings or other evidence can be produced to demonstrate the existence of the said rivers.

(c) the alleged existence of the twin culverts.

In his evidence, SD2 (Dr Andy Chiam Tou Ping, Ds' expert witness) stated that when he got involved with the development project sometime in 2015, there was no twin culvert, as alleged by the Ps. He said this could be because it was, at that time, a temporary structure (pp. 450, 453, NOP, Vol. 3, encl. 226).

If there were any twin culverts, the licensed surveyor would have picked them up in the sketch plan. Therefore, the allegation of the Ds concealing the existence of the twin culvert is untenable. The Ps could not produce any evidence of the presence of the said twin culvert save for bare assertions. The burden is on the Ps to prove, in which case they failed.

(d) the source of water that caused the flooding is from the MRR2.

The only water source is from the surface runoff from the MRR2, which was diverted there after the cascading drains were constructed during the MRR2 upgrading works. There is no convincing evidence of any river/stream in the area, as alleged. The Ds did not cause or contribute to the incidents of flooding of the Ps' Houses as alleged.

(e) the RC wall.

According to SP14 (Dr Toh Cheng Teik, Ps' expert witness), in his evidence, there are two reports of different periods where the cracks in the Ps' Houses appeared, presumably by ground settlement (p. 95, NOP, Vol. 3, encl. 226):

(1) cracks and settlements supposedly occurred over the period of backfilling of the RC wall, and

(2) cracks and settlements supposedly occurred over the piling period.

Cognisance must be taken that the Ps only pleaded ground settlement from the construction and backfilling of the RC wall in the amended SoC. Cracks and settlements from the pilling works are nowhere pleaded. This can be seen in para. 25(j) of the amended SoC. In the circumstances, the Ps are bound by their pleadings: *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals* [2022] 10 CLJ 209. Consequently, the issue of pilling is not an issue to be considered by the court.

In this regard, no evidence is adduced by the Ps to show that the construction and backfilling of the RC wall caused the ground settlement. It renders their assertions as bare assertions.

The erection of the RC wall was completed in April 2019. In taking measurements to supposedly ascertain the degree of the alleged ground settlement, SP15 (En Abdul Aziz bin Md Noor, a consulting engineer, Ps' expert witness), gave evidence that any settlement resulting from the construction and backfilling of the RC wall would have occurred before any of the measurements were taken (p. 35, NOP, vol. 3, encl. 226). The monitoring exercise carried out afterward would only show residual settlement.

SP14 (Dr Toh Cheng Teik, Ps' expert witness), in his report dated 28 July 2020, observed that there was effectively no settlement on the Ps' houses during the observation period from 25 July 2019 until 25 August 2019 (p. 11, exh. TC-1, encl. 60). SP14 speculated in his

evidence that settlements recorded in his report resulted from the piling activity and not construction and backfilling of the RC wall. Piling is not an issue before the court to be considered.

SP14 (Dr Toh Cheng Teik, Ps' expert witness) also stated in his report that the settlement recorded on both settlement monitoring exercises is extremely small and unlikely to result in structural distress.

The construction and backfilling of the RC wall did not attribute to the ground settlement as pleaded. There is no convincing evidence adduced to support this claim by the Ps.

Evidence at the trial has shown that the RC wall did not require any setback, an issue raised by the Ps and was adequately constructed in accordance with the guidelines set by the relevant authorities. The Jabatan Perancangan Bandar dan Desa letter dated 14 September 2018 clarified this matter (pp. 256 to 261, bundle C, IDB, Vol. 2, encl. 46). The Ps elected not to challenge the governmental approval(s) granted to the Ds in undertaking the development project *via* judicial review. They cannot now take a collateral challenge to those decisions by the relevant authorities.

(f) damages sought by the Ps.

Damages do not arise if the Ps cannot substantiate their pleaded case before the court. Evidence has shown that the flooding was attributed to the discharge of water from MRR2 that is not within the contemplation of the JPS approval granted to D1. Ds cannot be made liable for the flooding resulting from it.

It is argued by the Ds that para. 23 of the Ps' amended SoC did not sufficiently allege damages against the Ds. The alleged damages could have existed before the flooding incidents and the Ds construction works. The SoC did not clarify save for paras. 13 to 19 of the amended SoC.

The evidence of SP16 (Mohd Asri bin Mohd Aris, property valuer, exh. MA-1, encl. 216), who gave his opinion on the compensation/ loss in value of the Ps' Houses, is premised on factors that are not pleaded at all in the amended SOC and are therefore irrelevant to this proceedings. His valuation is of little use to this court.

In the circumstances, the Ds pray for the Ps' claim to be dismissed.

**[9]** The plaintiffs' submissions (L.228 & L.234)

(i) I observed the Ps' response to the critical position the Ds took. In a nutshell, the Ps argued:

A (a) the Ps submitted that:

(1) the source of water surface runoff from JKR upgrading works on MRR2, and

(2) that the Ds had obtained the relevant authority approval for
B their development and construction work before the commencement of the MRR2 upgrading works was irrelevant in denying the Ps' claim.

(b) the Ps' claim is grounded on the Ds' alleged blockage of the stream or waterway. However, this argument by the Ps could not be
C sufficiently established at the trial, even by the Ps' witness. SP4 (Mohd Hasrul Hisham bin Abdullah, an engineer with JPS Daerah Gombak, pp. 170 to 171, NOP, Vol. 1, encl. 212) did not corroborate the Ps' position convincingly. Speculation is not a good evidence.

D (c) it is to be judicially determined if the construction works and the erection of the RC wall blocked the stream or waterway and occasioned the flooding. Where the water originated is unimportant to the present case: *Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Dev (M) Sdn Bhd* [1985] CLJU 103; [1986] 1 MLJ
E 412. I am unconvinced by this argument. There is no compelling evidence that the RC wall caused the deluge, as claimed by the Ps. What has been presented is merely an unsupported assertion in the Ps' lengthy submissions.

F (d) the blockage of the natural water flow caused the flooding, affecting the Ps' Houses. The Ps alleged that the Ds had concealed the existence of the waterway and omitted to cater for the waterway in securing its planning approval. I find this allegation sufficiently negated by the Ds. I find this allegation to be the cause of the deluge unsupported. Other than that assertion, no definitive evidence
G supports such a conclusion. The allegation of concealment by the Ps cannot hold in light of what was disclosed at trial that I have addressed in the findings.

(e) this natural waterway had always been there to drain the waters of the original MRR2 flowing down from the twin culverts through the
H natural photography of the site into this stream or waterway into the box culvert next to house 32 and then to the detention pond next to the Surau Al Mukmin.

(f) the MRR2 upgrading works to construct a new slip road adopted and
I applied the same drainage scheme to channel water safely to the detention pond next to the Surau Al Mukmin *via* the stream or waterway behind the plaintiffs' houses, which JPS approved.

(g) this can be seen in the JKR's report entitled "Laporan Kejadian Banjir di Taman Mutiara Gombak 2 Berhampiran Projek Menaiktaraf Jalan Lingkaran Tengah [MRR2], Persimpangan Taman Melati dan Kerja-Kerja Berkaitan Secara Reka dan Bina" dated 10 April 2019.

(ii) the Ps asserted:

(a) the Ds individually and/or jointly owe a common law duty of care to the Ps in undertaking the development project. Breaching this duty by the Ds had caused the three flooding incidents, which damaged the Ps' Houses as claimed.

(b) the Ds are equally liable for nuisance in the non-natural use of the land in building an earth platform and the erection of the RC wall. It interfered with the use and enjoyment of the Ps' lands, causing floods, water damage, continuing water ponding and seepage, settlement and cracks to the Ps' property. The loss and damage suffered by the Ps are the same and coexistent with the loss and damage by the Ds' negligence.

(c) the Ds are also liable to the Ps for breach of statutory duty:

(1) breach of s. 21A(1), Town and Country Planning Act 1976. (Not pursued).

(2) breach of s. 5(1)(b), Waters Act 1920, for obstructing and/or blocking the section of the stream or detention pond.

(3) breach of s. 7(1) Waters Act by causing a diversion of the section of the stream from the detention pond.

The losses and damage suffered by the Ds coexist with the breach of duty of care (negligence).

(iii) It is the pleaded case by the Ps that the foregoing caused the three major flooding incidents, causing the Ps to suffer loss and damage. I find no issue with the facts concerning the flooding of the impugned location with the evidence at the trial. It did occur; it was only a question of what had caused the deluge that had damaged the Ps' houses. Compensation for loss and damage as submitted by the Ps can be assessed and attached if the compelling weight of evidence as opposed to speculative assertions before the court is available to fault the Ds' construction and development activities for the deluge. The damage to the Ps' Houses is extensive, as I and the relevant parties have personally visited and viewed the impugned location. Corrective measures must be taken to rectify the damage and restore the impacted homes. I find no issue with

A the extent of the losses and damages the Ps suffered. What requires careful determination is the party that is responsible for the deluge grounded on the clarity of the evidence adduced before the court, lest a wrong party is faulted for it.

The Ps pray for the claim to be allowed with costs.

B

**The Law**

**[10]** The legal position in a nutshell:

(i) the tort of negligence requires proof of specific elements before it is established, despite carelessness on the part of the defendant and injury or damage sustained by the plaintiff. In *Blyth v. Birmingham Waterworks Co* [1856] 11 Ex Ch 781, Alderson B said:

C

> that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.

D

Lord Wright in *Lochgelly Iron And Coal Co v. McMullan* [1934] AC 1 explained that negligence means more than heedless or careless conduct. Duty in the tort of negligence means a duty imposed by the law or legal duty. Only the breach of this duty and its resulting damage may give rise to liability for negligence.

E

(ii) essentially, to establish negligence, three elements must be fulfilled:

(a) there is a duty of care on the part of the defendant;

F

(b) the defendant breaches this duty; and

(c) the breach causes damage that is not too remote to the plaintiff, although these elements are not necessarily exclusive of the other at all times.

G

See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals* [2003] 1 CLJ 585; [2003] 1 MLJ 567.

Lord Esher in *Heaven v. Pender* [1883] 11 QBD 503 said that whenever one person is by circumstances placed in such a position concerning another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his conduct about those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such risk.

H

(iii) the cause of action for negligence arises on the date the plaintiff suffers the loss: *Bank Bumiputra Malaysia Berhad lwn. Tetuan Wan Marican Hamzah & Shaik & Lagi* [1994] 2 CLJ 365; [1994] 1 MLJ 124.

I

(iv) duty of care on the part of the defendant.

(a) the objective test used in determining the existence of a duty of care is the neighbour principle advocated 38 years prior to 1970, which was cited with approval in *Home Office v. Dorset Yacht Co Ltd* [1970] AC 1004, where Lord Reid said it should apply unless there is some valid justification for its exclusion.

(b) the neighbour principle was propounded by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 in short:

(1) the rule that you are to love your neighbour becomes in law; you must not injure your neighbour.

(2) you must take reasonable care to avoid acts or omissions you can reasonably foresee would likely injure your neighbour.

(3) a neighbour in law seems to be persons who are so closely and directly affected by my act or omission that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

(c) the neighbour principle is based on an objective test in that the court will seek to determine hypothetically whether a reasonable man, in the same circumstances as the defendant, foresees that his conduct will adversely affect the plaintiff:

(1) if the determination is negative, the plaintiff is not a neighbour of the defendant, and no duty of care arises.

(2) if it is affirmative, the plaintiff is a neighbour of the defendant, and the latter owes a duty of care.

(d) Lord Reid's observation was developed further in *Anns v. Merton London Borough Council* [1978] AC 728, where Lord Wilberforce said that to determine whether a duty of care existed in a particular situation, the facts need to fit into any existing category in which a duty of care has been held to exist, set forth the two-stage test:

(1) it must be determined whether there is a sufficient relationship of proximity or neighbourhood between the alleged tortfeasor and the person who has suffered the loss. If it can be ascertained that the tortfeasor should have foreseen that the carelessness on his part may cause damage to the other party, *prima facie*, a duty of care would be established, and

(2) if the answer to the above is affirmative, the court then has to examine whether any considerations may negate, reduce or limit the scope of the duty or the group of persons to whom the duty will be imposed.

(e) the House of Lords in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 observed, amongst others, that:

(1) a relationship of proximity or neighbourhood under the principle laid down by Lord Atkin must be proved before a duty of care is said to exist;

(2) the scope of the duty is dependent on the facts of each case;

(3) in determining whether a duty of care will be imposed on a defendant, the court must consider whether it is just and reasonable to do so; and

(4) in considering this 'just and reasonable' element in the imposition of a duty of care, the plaintiff, and not the defendant, has to identify and justify, on policy grounds, that a duty exists.

(f) in *Leigh & Sillavan Ltd v. Aliakmon Shipping Co Ltd* [1986] 2 All ER 145, held that in claims for economic loss, a person may only claim successfully for loss incurred by him as a result of damage to his person or his property. The claimant must have a current proprietary interest in the damaged property. There is no duty regarding economic loss to persons other than the injured party himself. This was applied by Lord Keith (Privy Council) in *Yuen Kun-Yeu v. AG Of Hong Kong* [1987] 2 All ER 705.

(g) the Privy Council further observed in *Rowling v. Takaro Properties Ltd* [1988] 1 All ER 163 that before the court can conclude that a duty of care should be imposed, all the relevant circumstances must be considered.

(h) the House of Lords in *Caparo Industries Plc v. Dickman* [1990] 1 All ER 568 where Lord Bridge stated that the chances of the plaintiff succeeding in establishing the existence of a duty of care depends on the kind of harm he has suffered. The House of Lords observed that notwithstanding the foreseeability of the nature of the injury that has materialised, the court must still look at the case as a whole and be satisfied that it is 'fair, just and reasonable' to impose a duty of care. A duty of care arises when the following factors are met:

(1) the damage is reasonably foreseeable.

(2) there is a close and direct relationship of proximity between the plaintiff and the defendant, and

(3) the circumstances as a whole must be such that it is fair, just and reasonable for the imposition of a duty of care.

(i) proximity/foreseeability can be established when the defendant has assumed responsibility towards the plaintiff: *Tokio Marine Insurans (M) Bhd v. WCT Construction Sdn Bhd & Anor* [2018] 4 CLJ 808; [2018] 11 MLJ 83. Foreseeability is often used interchangeably with proximity, and these terms do not necessarily mean physical nearness.

(v) breach of this duty of care

(a) in *Blyth v. Birmingham Waterworks Co* [1856] 11 Ex Ch 781, held:

(1) negligence is the omission of doing something which a reasonable man would do or doing something which a reasonable man would not do.

(2) a breach of duty is determinable through the reasonable man test. The question is: would a reasonable man have acted as the defendant had done if the reasonable man faced the same circumstances as the defendant?

(3) the standard of care required is not that of the defendant himself but of this 'reasonable man'.

Greer LJ in *Hall v. Brooklands Auto-Racing Club* [1933] 1 KB 205 described the reasonable man as the man on the street, or the man on the Clapham Omnibus, or the man who takes the magazine at home and in the evening pushes the lawnmower in his shirt sleeves. The defendant's action must conform to the criteria expected of a person of normal intelligence. However, the House of Lords in *Caminer v. Northern And London Investment Trust Ltd* [1950] 2 All ER 486 observed that if the defendant is a person who, by his status, is deemed to possess particular knowledge about a specific situation, the standard of care expected of him is of a reasonable man in that position.

(b) in *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] CLJU 29; [1977] 2 MLJ 103, the Federal Court held that in considering whether or not the defendants were in breach of their duty of care, it was necessary to consider whether the risks of injury to the plaintiff were reasonably foreseeable. Assuming it was, the next question was whether the defendants had taken reasonable steps to protect the plaintiff against those risks.

(c) in *Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors* [1982] CLJ 150; [1982] CLJ (Rep) 232); [1981] 2 MLJ 27, the Federal Court distinguished this case from *Jumat's* case, (*supra*). It held the defendants negligent as they had failed to take reasonable steps to prevent injury to the plaintiff under their care.

(d) the factors the court considers in determining the required standard of care are varied. It is up to the trial judge. The standard of care is a question of law, but a finding that the defendant has met or has not met that standard is a matter of fact.

See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors & Other Appeals* [2003] 1 CLJ 585; [2003] 1 MLJ 567.

(vi) the breach causes damage to the plaintiff

(a) the evidence adduced at trial on the defendant's conduct must satisfactorily establish that it had occasioned the alleged damage/injury to the plaintiff. "But for" the defendant's breach of duty, would the plaintiff, on a balance of probability, suffer the injury or harm claimed? The "but for" test of causation produces an all-or-nothing result. The defendant is liable if the plaintiff did not suffer injury but for the defendant's negligence. The neglect of the defendant must have been a necessary condition to occasion the injury or harm: *Dr Gun Suk Chyn & Ors v. Kartar Kaur Jageer Singh & Anor* [2014] 1 CLJ 838; [2014] 1 AMR 200; *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449:

(1) the first step in establishing causation (but for) is to eliminate irrelevant causes.

(2) the court is not concerned with identifying all the possible causes of the incident.

(3) only the effective cause of the damage caused is of concern.

(4) would the damage have occurred but for the defendant's negligence?

See also *Dr Noor Aini Hj Sa'ari v. Sa-Art Sae Lee & Anor* [2016] 2 CLJ 23; [2016] AMR 309; *Swamy v. Matthews & Anor* [1967] CLJU 174; [1967] 1 LNS 174; [1968] 1 MLJ 138; *Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat & Other Appeals* [2017] 2 CLJ 274; [2017] 1 MLJ 328.

(vii) the Court of Appeal ruled in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29, that in an action for negligence, the plaintiff must establish:

(a) the defendant's action was the effective cause of the injury suffered by the plaintiff;

(b) there must be a causative link between the wrongdoing and the damage/injury caused; and

(c) the plaintiff's claim must fail without a causative link.

The Federal Court in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] CLJU 43; [1968] 1 LNS 43; [1969] 1 MLJ 99, ruled that the plaintiff's claim for negligence could not succeed for failing to establish the "cause and effect" of the death of the fish in the river. There was no positive proof that the discharge from the defendant's mine had anything to do with the death of the fish. There was only a possibility.

**Findings**

**[11]** The court and the relevant parties visited the impugned site to view the extent of the damage to the houses suffered by the Ps. It is a distraught and sad sight to see. One can only imagine the despair of the Ps. I can only express my profound sympathy for the misfortune that had befallen the Ps. God forbid, no one should live through such a distressful experience with their place of abode. It was most unfortunate in the circumstances, and my heart goes out to them.

That said, I am still duty-bound to decide this case based on the evidence before the court. As a matter of law, I cannot simply attach fault and liability if the evidence produced by the Ps does not support such a ruling. All cases are decided on the legal burden of proof being discharged or not. It is the acid test applied in any particular case. To quote Lord Brandon in *Rhesa Shipping Co SA v. Edmunds* [1985] 1 WLR 948 at 955 said:

> No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.

I have examined all cause papers, the evidence and/or the lack thereof at the trial, and the parties' submissions in canvassing for their position in the present suit. All things considered, from the totality of the parties' materials canvassed and ventilated before me, it is my considered judgment that:

(i) the Ps failed to satisfactorily discharge their burden to establish the claim in the SoC as required under ss. 101 to 103 of the Evidence Act 1950: *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855:

> The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms 'proved', 'disproved', and 'not proved' are statutory definitions contained in the Evidence Act (Cap 9), 1997 Rev Ed), the term 'proof'. Wherever it appears in the Evidence Act and unless the context otherwise suggests, means the burden to satisfy the Court of the existence or non-existence of some fact, that is, the legal burden of proof.

I had, among other things, observed and considered the foregoing paras. [8] of the Ds' submissions and [9] of the Ps' submissions. It is my considered judgment that the Ps, unfortunately, failed to adduce the required convincing evidence in totality to tilt the scale of proof to establish their claim. What is before me from the Ps' side are speculative materials leading to a suggestion that it was possible. That does not satisfy the required burden by law. The weight of evidence does not support such a conclusion. The Ps' witnesses, including the experts in their respective fields, could not satisfactorily nail the issue to establish guilt on the Ds' part. It opens the door for more speculations as to what had happened. Speculative evidence to suggest fault is never good evidence in law. I cannot rest a definitive finding on it.

(ii) it is trite in law that the burden of establishing the case is on the Ps. It is not the Ds' duty to disprove it. The evidentiary burden is that those who allege a fact are duty-bound to prove it (see ss. 101, 102, and 103 of the Evidence Act 1950).

*Selvaduray v. Chinniah* [1939] CLJU 107; [1939] 1 LNS 107; [1939] 1 MLJ 253, 254 held:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours.

*Johara BI Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1981] 1 MLJ 139 held:

> It was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant, and no matter if the defendant's case was completely unbelievable, the claim against him must in this circumstances be dismissed. With respect, we agree with this judicial approach.

(iii) in arguing for their case:

(a) I find the postulations by the Ps unconvincing for want of compelling evidence. As ruled by the Court of Appeal in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29 in an action for negligence, the plaintiff must establish:

(1) the Ds' action was the effective cause of the injury suffered by the Ps,

(2) there must be a causative link between the wrongdoing and the damage/injury caused, and

(3) the Ps' claim must fail without a causative link.

(b) I cannot find from the facts adduced that attach the Ds with fault and liability appropriately.

(c) the Ps failed to meet two out of the three legal requirements to establish negligence as set out in para 10.2 herein:

(1) there is a duty of care on the part of the Ds;

(2) the Ds breaches this duty; and

(3) the breach causes damage to the Ps.

See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals* [2003] 1 CLJ 585; [2003] 1 MLJ 567.

Definitive proof of fault and liability on cogent evidence for determination is unavailable. No matter how forceful, passionate and overreaching the arguments and assertions by the Ps may be, *sans* compelling proof, it is reduced to speculation at best, and the court will not act on speculation, no matter how sympathetic the court may be to the Ps' cause and plight.

(d) the Federal Court in *Guan Soon Tin Mining Co v. Wong Fook Kum* (*supra*), held that there was no positive proof, but only a possibility. Consequently, it cannot amount to a greater weight of evidence to which fault and liability can be attached.

**[12]** In coming to the foregoing conclusions, I determined that:

(i) contrary to the assertions of the Ps, I find that the water source that had caused the flooding and damage is essential to this case. It was undeniable at the time that a substantial deluge of surface runoff water from MRR2 (during the upgrading period) had contributed to the area's flooding. Evidence at trial shows that the relevant authorities were concerned about diverting the water to the Sungai Gombak, involving third parties to mitigate flooding issues. However, evidence showed that it was not done. JKR had to take mitigating actions to arrest the problem. It is not disputed that the upgrading works on MRR2 with significant volumes of surface runoff water being diverted into the plot of land north of D1's land. In the circumstances, it is safe to hold that, other than the Ds, other relevant and pertinent party(s) were in play to the flooding incidents that had not been brought forward for whatever reason(s) best known to the Ps.

A The Ds had produced sufficient materials to show that their construction and development activities in the project secured all the required approvals from the relevant public authorities. They had the legal right to undertake the duly approved project on the D1's land. If any of those approvals are suspect or wrongly issued without considering the welfare B and interest of the Ps that share the same locality or neighbourhood, it should have been challenged by judicial review under O. 53 to arrest the said development works from commencing and/or proceeding. But there is none.

(ii) irrefutable evidence:

C (a) it has been shown that TEGAS/TP1, the owner of MRR2, a highway that is on an elevated topographical point compared to D1's land and the Ps' Houses in Taman Mutiara Gombak 2, had also obtained approval from JPS to carry out drainage works to divert surface runoff water while the planned upgrading works are D undertaken. It had been shown that TP1 had constructed two cascading drains from MRR2, which immediately diverted surface runoff water from the MRR2 onto a plot north of D1's land. A slit trap was also constructed at the bottom of the cascading drains. Surface runoff water from the MRR2 would flow into the slit trap E and, following the land's topography, flow towards the lower-lying area of Taman Mutiara Gombak 2. It had also been shown that no flooding incidents occurred before this exercise.

(b) the deluge occurred in three separate incidents (12 November 2018, 28 March 2019, and 4 April 2019). Cognisance must be taken that F on 9 April 2019, D1, MPS, JPS, JKR, and TP1 (all parties in play) met to decide that JKR would divert the water from the MRR2 to Sungai Gombak, which is towards the northern direction and away from D1's land. Cognisance must also be taken that after JKR eventually sealed off the sump on the top of one of the cascading G drains from MRR2, where the volume of water from MRR2 was being diverted into the plot of land adjacent to D1's land, no further incidents of flooding occurred. SP14 (Dr Toh Cheng Teik, Ps' expert witness) confirmed no more flooding was reported after the foregoing action was taken (pp. 97 to 98, NOP Vol. 3, encl. 226). H SD2 (Dr Andy Chiam Tou Ping, Ds' expert witness), in his evidence (p. 375, NOP, Vol. 3, encl. 226), stated that except for three flooding instances, the temporary drainage measure taken by the Ds in the development project managed to accommodate the deluge of water from the MRR2, with no flooding of the Ps' Houses.

I (c) it is my judgment that, taking the facts in their totality, I am constrained to find that the Ps' claim is wanting in compelling proof to attach liability on the Ds for the deluge that occurred and the

resulting damage to the Ps' houses. There is no evidence in the circumstances to attach liability to the Ds. What has been presented are conjectures and "maybe" instead of convincing evidence. It leaves substantial room for speculation. The court cannot act on speculation but only on proven facts.

(d) I cannot in good conscience attach liability on the Ds grounded on speculative evidence, no matter how assertive the arguments may be. I also believe that the third party(s) should have been cited as parties to this suit to explore the facts and evidence more comprehensively and compellingly to nail the guilty party, if any, with certainty and not speculatively. But then again, that is for the Ps to decide. It is only my observation.

(iii) the Ps strenuously argued:

(a) on the alleged existence of a stream/river that had been blocked by the construction activities of the Ds, which caused the three flooding incidents.

(b) it was further alleged that the Ds had concealed this fact in securing the planning approval from the relevant authority.

(c) however, contrary to this assertion, there is no compelling proof of the existence of the alleged river/stream at the time of the incident produced at trial.

(d) I also consider that the amended SoC did not mention any stream/river but only a retention pond. Parties are, by law, bound to their pleadings. This rendered it a non-issue to be considered.

Nevertheless, SP4 (Mohd Hasrul Hisham bin Abdullah, an engineer with JPS Daerah Gombak), in his evidence, said that the sketch plan (P5) is overlaid on an old map, most likely from a time even before MRR2 (1990s) was constructed (pp. 170 to 171, NOP, Vol. 1, encl. 212). SP4 speculated (maybe) that given MRR2 cut across the rivers in P5, the rivers would likely either be diverted or a culvert prepared underneath MRR2 to allow for the river to continue flowing *sans* any corroborating evidence. No photographs, video recordings or other evidence can be produced to demonstrate the said rivers' existence for this proceeding. This argument by the Ps must surely fail for lack of cogent evidence.

(e) SD2 (Dr Andy Chiam Tou Ping, Ds' expert witness) stated that there was no twin culvert, as alleged by the Ps. (Pages 450, 453, NOP, Vol. 3, encl. 226). If there were any twin culverts, the licensed surveyor would have picked them up in the sketch plan. Therefore, the allegation of Ds' concealment cannot hold. The burden is on the Ps to prove, in which case they failed.

(iv) I find the arguments:

(a) on the RC wall as the cause of the deluge and the damage to the Ps' Houses flawed and unproven. This is premised on the evidence of parties at the trial. Other than conjectures, there is, in my considered view, no persuasive evidence that the approved RC wall is the cause of the flooding that occurred.

(b) what has been argued by the Ps is speculative at best. I agree with the Ds that if there is an administrative error or illegality in the approvals granted impacting the Ps' residence, an immediate challenge should have been mounted under O. 53 of the RC 2012, together with all other relevant court processes, to arrest the development, but it was not taken.

(c) in the circumstances, I am unpersuaded with the Ps' evidence that the Ds' RC wall caused the flooding by obstructing the water flow. There are insufficient evidential materials that can tilt the evidence scale to make such a finding.

(d) SP14 (Dr Toh Cheng Teik, Ps' expert witness), in his evidence, opined there are two possible causes of the cracks to the Ps' Houses: (1) occurring because of the Ds' backfilling of the RC wall and (2) occurring over piling works by the Ds (p. 95, NOP, Vol. 3, encl. 226).

(e) I accept that the Ps in their amended SoC in para. 25(j) only pleaded cracks from the construction and backfilling of the RC wall works, not the latter (piling works). The Ds correctly cited *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals* [2022] 10 CLJ 209, that parties are bound by their pleadings. Piling is not an issue to be considered for this proceeding. In the circumstances, no evidence is adduced by the Ps to show that the construction and backfilling of the RC wall caused the ground settlement, making it a bare assertion.

See the evidence of SP15 (En Abdul Aziz bin Md Noor, a consulting engineer, Ps' expert witness, p. 35, NOP, Vol. 3, encl. 226) that any settlement resulting from construction and backfilling of the RC wall would have occurred before any of the measurements were taken. The monitoring exercise carried out afterwords would only show residual settlement.

See also the evidence of SP14 (Dr Toh Cheng Teik, Ps' expert witness, p. 11, exh. TC-1, encl. 60) that there was effectively no settlement on the Ps' house during the observation period from 25 July 2019 to 25 August 2019. The settlement recorded on both settlement monitoring exercises is extremely small and unlikely to result in structural distress.

(f) the Jabatan Perancangan Bandar dan Desa letter dated 14 September 2018 (pp. 256 to 261, Bundle C, IDB, Vol. 2, encl. 46) negated the Ps arguments that the RC wall requires a setback. The Ps elected not to challenge the validity of this administrative decision and cannot now raise this issue in this proceeding as a collateral challenge.

(g) I cannot find relevant and definitive evidence that the erection of the RC wall (construction and backfilling works) caused the ground settlement under some of the Ps' Houses. With piling works, not an issue to be considered, the Ps' expert witness could not nail the issue positively on the construction and backfilling works, leaving room for more speculation. Possibly, it is not good evidence. Though I sympathise with the Ps' sufferings, I am constrained by the lack of definitive evidence to hold that the Ds had occasioned the damages.

(v) the legal position is trite that when the Ps cannot establish their pleaded case, the issue of damages does not arise. The evidence of SP16 (Mohd Asri bin Mohd Aris, property valuer, exh. MA-1, encl. 216) is irrelevant in the circumstances.

**[13]** In the premise, I find the weight of evidence had tilted the scale of evidence in the Ds' favour. The answers to the issues posted are:

The agreed issues between the parties

(i) negligence:

As said by Lord Esher in *Heaven v. Pender* [1883] 11 QBD 503 that:

> Whenever one person is by circumstances placed in such a position concerning another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his conduct about those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such risk.

The standard of care is a question of law, but a finding that the defendant has met or has not met that standard is a matter of fact (*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals* [2003] 1 CLJ 585; [2003] 1 MLJ 567). The Privy Council further observed in *Rowling v. Takaro Properties Ltd* [1988] 1 All ER 163 all the relevant circumstances must be considered. The evidence adduced at trial on D's conduct must satisfactorily establish that it had occasioned the alleged damage/injury to the Ps.

A See *Dr Gun Suk Chyn & Ors v. Kartar Kaur Jageer Singh & Anor* [2014] 1 CLJ 838; [2014] 1 AMR 200; *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449. "Only the effective cause of the damage caused is of concern. Would the damage have occurred but for the defendant's negligence?"

B *Caparo Industries Plc v. Dickman* [1990] All ER 568 made it clear that the court must still look at the case as a whole and be satisfied that it is 'fair, just and reasonable' to impose a duty of care. The circumstances as a whole must be such that it is fair, just and reasonable for the imposition of a duty of care.

C I believe the Ds owe a common law duty of care to the Ps as the lawful neighbour for the development and construction works undertaken. However, anchored on merely speculative evidence, there is no compelling material to say with a greater weight of evidence that the Ds had breached that duty of care. Based on the evidence, I can find no

D persuasive materials to attribute the flooding incidents to the Ps' land and houses on the Ds' construction works. Other factors and parties in play had not been brought before the court to be duly examined.

The law requires that the circumstances as a whole must be considered.

E (ii) nuisance:

Based on the evidence before the court, I find that the construction works for the development of D1's land had not unlawfully interfered with the use of Ps' property. The allegation of nuisance must fail in the circumstances. From the totality of the facts gathered at the trial, I find

F the attempted argument on the use of the rule in *Rylands v. Fletcher* [1868] LR 3 HL 330 by the plaintiff untenable. *Rylands v. Fletcher* had been restated in *Gore v. Stannard (t/a Wyvern Tyres)* [2014] QB 1. The distilled principles are:

G (1) The defendant must be the owner or occupier of the land;

(2) The defendant must bring or keep or collect exceptionally dangerous or mischievous things on his land;

(3) The defendant must have recognised or ought reasonably to have recognised, judged by the standards appropriate at the relevant place and time, that there is an exceptionally high risk

H of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be;

(4) The defendant's use of his land must, having regard to all the circumstances of time and place, be extraordinary and unusual;

I (5) The thing must escape from his property into or onto the property of another;

(6) The escape must cause damage of a relevant kind to the rights and enjoyment of the claimant's land;

(7) Damages for death or personal injury are not recoverable, and

(8) It is not necessary to establish the defendant's negligence, but an Act of God or the act of a stranger will provide a defence.

It is obligatory on the part of the Ps to fully and satisfactorily establish the negligence of the Ds, which, in the present suit, they fail to do at the trial, as seen in the foregoing paragraphs. It is a given fact during the trial that there is no actual compelling evidence to attach fault and liability. Similarly, this assertion must fail.

(iii) statutory duty:

Based on the lack of persuasive evidence, I find that the Ds have not breached s. 5(1)(b) of the Waters Act 1920 ("Waters Act") by obstructing and/or blocking the stream from the detention pond, which also answers the allegation on the breach of s. 7(1) of the Waters Act by causing the diversion of rivers from their natural water course without lawful authority and/or the requisite licence under the Waters Act. There is no persuasive evidence save for bare overreaching assertions that the defendant breached its statutory duty. The four elements required to establish civil liability for the breach of statutory duty are not satisfied.

(a) the injury suffered is within the ambit of the statute;

(b) the statutory duty imposes a liability to a civil action;

(c) the statutory duty was not fulfilled; and

(d) the breach has caused the injury.

**[14]** Non-agreed issues:

There is also no compelling evidence that can nail liability on the construction and/or development works carried out by the Ds, causing settlements to the Ps' land and impacting the houses. The evidence does not fit the claim. Expert evidence tendered is merely speculative rather than definitive.

Consequently, I find that the plaintiff was unable to establish that (1) the defendant's action was the effective cause of the injury suffered, (2) was unable to prove a causative link between the alleged wrongdoing and the damage/injury caused, and therefore, (3) the plaintiff's claim must fail: *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29; *Dr Gun Suk Chyn & Ors v. Kartar Kaur Jageer Singh & Anor* [2014] 1 CLJ 838; [2014] 1 AMR 200; *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449.

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## Conclusions

**[15]** After considering the facts, the totality of the evidence adduced at the trial and the parties' respective arguments:

(i) I am unconvinced of the Ps' claim grounded by and large on uncertain and speculative evidence. The court cannot act upon speculations;

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(ii) from the evidence before me, I cannot find and attach the Ds with fault and liability as claimed. Consequently, the Ps failed to discharge their burden to establish their claim;

C

(iii) I am guided by *Selvaduray v. Chinniah* [1939] CLJU 107; [1939] 1 MLJ 253, 254 (*supra*) and *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1981] 1 MLJ 139 (*supra*) that, ... until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant;

D

(iv) accordingly, on a balance of probabilities, that the scale of evidence tilted in the defendants' favour. I am constrained to, therefore, dismiss this suit with no order as to costs, as the Ps had suffered enough. Parties are ordered to bear their own respective costs; and

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(v) similarly, the claim by the Ds against third parties is hereby struck out with liberty to file afresh.

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